

The Do's and Don'ts of Splitting Assets

By Kathleen M. Newman

Nothing is really simple when it comes to divorce, least of all the tedious and often painful process of deciding who gets to keep what. Many people just starting the divorce process are confused about which assets must be split between both parties and which can be kept by each individual. In general, this is a confusing topic for even the savviest of clients. Therefore, it is important to have a basic understanding of what the terms marital and nonmarital really mean when it comes to property.

Marital property

Marital property means property (real or personal) acquired by the parties together or individually at any time during the existence of the marriage. Even property acquired by either spouse before the dissolution of the marriage and before the valuation date is presumed to be marital property regardless of whether title is held individually or by the spouses jointly. The presumption of marital property can be overcome by showing that the property is nonmarital. Simply put, everything is considered marital property until the spouse making a nonmarital claim provides sufficient documentation proving a particular piece of property is nonmarital.

Nonmarital property

Nonmarital property can be any property acquired by either spouse before, during or after the marriage if the property meets one of the following criteria. Property is nonmarital if it is acquired as a gift or is inherited by one spouse and not the other from a third party. Property acquired before the marriage is nonmarital, but the spouse claiming that said property is nonmarital must prove that the property was acquired before the

marriage. Property is nonmarital if the property is acquired after the date of valuation. Property is also nonmarital if said property is excluded by a valid antenuptial (also known as a prenuptial) agreement. The increase in value of nonmarital property or the exchange thereof is also nonmarital. However, all nonmarital claims must be supported by sufficient documentation, otherwise the property will be considered marital.

Getting started

When people are going through a divorce, the judge will typically conduct an equitable property division in the final orders and decree. Not all property is considered to be marital property, however, leaving some to not be subject to division.

Property division can be quite complex, especially in high-asset divorce cases among professional couples as there may be hidden assets or complex and intermingled assets.

Do provide documentation

When compiling a list of assets and property during the divorce process, it is important to recall when, how, and with what funds a particular piece of property was acquired. If you believe that a particular piece of property falls within one of the nonmarital property exceptions, you need to determine if a nonmarital claim can or should be made, what documentation is needed to prove the claim, and how best to determine the value of the nonmarital claim.

Do pick your battles

Many judges don't want to waste time getting involved in dividing individual items. They don't have the time and it is very difficult to do. The court will urge clients to go to mediation to resolve this.

If that doesn't work, it's likely clients will have a pre-trial conference with the judge, judge's law clerk or a matrimonial officer who would exert pressure on the lawyer(s) to get this worked out. It's really in your client's best interest to try to resolve this on their own. For your client to spend \$275 an hour for you to resolve who gets the \$300 painting is obviously counterintuitive.

Do hold on to the wedding ring

Anger and resentment in a divorce may give your client the urge to do away with their engagement ring or wedding ring. An engagement ring is considered separate property in most states since it represents a gift given to your client before marriage. Most rings are also worth a lot of money so if they have one, advise them to hold onto it. It could be an important source of income once they are on their own. The same goes for other high-value items in the marriage that are worth discussing even if there is no longer sentimental value attached to them now that the marriage is over. China, art, and other jewelry are all examples.

Don't overlook hidden assets

In many states, the law assumes that spouses are financial partners during a marriage and, as partners, they are entitled to share both the assets and income created by the partnership. Because of this concept, divorcing couples have a duty of full disclosure of their finances. They must disclose all of their income, assets, and debts accumulated during the marriage, including home/real estate ownership, bank and savings accounts, pensions and retirement/401k accounts and business ownership and operation.

Failure to fully disclose all assets or in-

come in divorce proceedings can carry serious consequences. That doesn't mean it doesn't happen. This is another instance in which good records, photos and proof can help your client. Alternately, as their attorney, you may have ways to bring hidden assets to the surface during a divorce proceeding.

Don't listen to threats

If your client's spouse threatens to have them pay for all the jewelry, vacations and other items he or she claims to have purchased during the marriage and even sends them an "official" bill, don't let them play into it. This is a spouse's attempt to scare and control the other party. Items purchased while they were married are marital property. If there is debt from the purchase of these items it will likely fall on both spouses, not just one.

Don't get hung up on false claims

Let's say your client's spouse's financial affidavit states that his/her 2013 Land Rover is worth \$20,000 less than it actually is and that s/he's making monthly payments when your client already wrote the check to pay for the car. First, remember that a financial affidavit is just his/her position. That's why there is a trial. Your client has the opportunity to get the car valued and to show the court that the accounts are closed. Yes, the affidavit is supposed to be sworn to be true, but in reality it is just another pleading. Just make sure your client gives you a clear list of what the truth is so you can prove those points. Obtain a blue book valuation for the car and the receipt for the accounts your client paid off and closed.

Don't take things that don't belong to your client

If your client moves out of the house, advise them to leave furniture or items that were purchased together. The court can rule the spouse is entitled to half of the furniture and that your client is in contempt of court for taking the items and not returning them. Also, if your client threatens to dispose of their spouse's



items if he/she doesn't come get them (i.e., willful dissipation of marital assets) it will count against them.

Another topic in this category is pets. Dogs, for example, are considered property by the courts and, as a result, are divided in the property settlement. Your client can ask for the dog, but keep in mind that the judge will try to assess who can best care for the dog and who has the greatest bond with him. Be prepared to make a case for why your client should get the pet. Your client shouldn't assume the pet is theirs without discussing it with their spouse.

Don't procrastinate

Your client shouldn't wait to open a bank account and apply for credit. They can't make purchases under their husband or wife's name when you are divorced. Also, recommend that they obtain a credit report so they will know if they qualify for loans or will be able to rent property.

Summary

Asset division during divorce is not a simple topic. The key to understanding the differences between marital and nonmarital property is hiring a family attorney who is experienced in handling

complex cases and who will represent their client's best interests, taking into consideration the long-term implications of every part of the divorce agreement. There are specific steps your client can take, both before and during a divorce, to protect their access to assets that they own fully or in part and a skilled attorney will walk them through each of these steps along the way.

Kathleen M. Newman has experience in all aspects of marital dissolutions, and has represented individuals on complex matters involving business ownership, valuing professional practices and financial analysis. Kathy sets herself apart through her strong advocacy of custody, support and parenting agreements. A board certified trial advocate in family law, a skilled mediator and a certified life coach, Kathy is also a fellow in the American Academy of Matrimonial Lawyers. Among her accolades, she has been consistently named a Top 40 Super Lawyer for family law and one of the Best Lawyers in America in family law. For more information, please visit www.kathynewmanlaw.com.

